

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA, and)
THE OSAGE MINERALS COUNCIL,)

Plaintiffs,)

vs.)

Case No. 14-CV-704-GKF-JFJ

OSAGE WIND, LLC;)
ENEL KANSAS, LLC; and)
ENEL GREEN POWER NORTH)
AMERICA, INC.,)

Defendants.)

**DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY
OF PLAINTIFF THE UNITED STATES' EXPERT WITNESS
STEVEN J. HAZEL AND OPENING BRIEF IN SUPPORT**

EXHIBIT 2

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
3
4 UNITED STATES OF AMERICA,
5
6 Plaintiff,
7
8 and
9 OSAGE MINERALS COUNCIL,
10 Intervenor-Plaintiff,
11 vs No. 14-CV-704-GKF-JFJ
12 OSAGE WIND, LLC,
13 ENEL KANSAS, LLC;
14 and ENEL GREEN POWER
15 NORTH AMERICA, INC.,
16 Defendants.

17 VIDEOTAPED DEPOSITION OF STEVEN HAZEL
18 Taken on Behalf of the Defendants
19 On April 29, 2021, beginning at 10:05 a.m.
20 All Parties Appearing Via Webconference

21 APPEARANCES
22 Appearing on behalf of the PLAINTIFF:
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26 Appearances Continued on Next Page
27 VIDEOTAPED BY: STESHA SNOW
28 REPORTED BY: MARY K. BECKHAM, CSR, RPR

1 **Q All right. And tell us what you do in**
2 **that role.**

3 A Well, broadly, I guess I'm responsible, is
4 the word I would use, for various different people
5 directly, work in broader teams on other different
6 matters, but, generally, I'm the person responsible
7 for the final product and, potentially, testifying.

8 **Q Is testifying as an expert witness your**
9 **primary work?**

10 A No.

11 **Q What is your primary work?**

12 A I mean, most people would consider me a
13 forensic accountant. So I do, you know, various
14 different things in the capacity as a forensic
15 accountant.

16 **Q Testifying as an expert is one of them,**
17 **correct?**

18 A True.

19 **Q What percentage of your time would you**
20 **estimate you devote to testifying as an expert**
21 **witness?**

22 A Well, I mean, I guess it depends on how
23 you define that, but if you're talking about
24 specifically in a testifying capacity, it's
25 probably, I don't know, ten hours a month.

1 Q And what about preparing expert reports?

2 By way of example, how often do you do that?

3 A Are you talking about expert reports in
4 the capacity of litigation, or are you talking about
5 expert reports generally?

6 Q We'll first start with litigation.

7 A I mean, it changes over time. I would say
8 it's probably 75 percent is in the form of
9 litigation at this point.

10 Q And do you also do work on occasion as a
11 non-testifying expert?

12 A Yes.

13 Q And tell us broadly what that usually
14 entails.

15 A Well, first of all, there could be a
16 consulting role, which I was actually including kind
17 of within the litigation environment, but then
18 there's also roles where we're just doing either
19 valuation work, for example, or tax analysis,
20 something like that. That would be outside of the
21 litigation environment, either prior to any
22 litigation commencing or some type of traditional
23 purpose, like financial reporting or a tax related
24 valuation, something like that.

25 Q Have you ever prior to this case been

1 involved in a litigation matter involving wind
2 energy?

3 A I believe there was -- yes.

4 Q All right. When was that, sir?

5 A It's been a while ago. It's been -- I
6 would guess it's probably around 15 years ago.

7 Q Do you recall the court in which that was
8 pending?

9 A No.

10 Q Do you recall the state it was in?

11 A I don't remember where the court state
12 was, but the project was in Wyoming.

13 Q And what was the litigation about, if you
14 recall?

15 A It was about some construction cost
16 overruns.

17 Q All right. And do you recall any of the
18 parties to the case?

19 A No.

20 Q Do you recall any of the lawyers?

21 A I can't think of who was involved with
22 that case. It's been a long time ago.

23 Q And what subject matter were you
24 testifying on in that case?

25 A Related to the potential cost overruns of

1 the project. And I didn't testify, just so we're
2 clear, but it was related to the overall
3 construction costs of the project.

4 Q All right. Were you retained as an expert
5 witness for one of the parties?

6 A Yes.

7 Q All right. Were you estimating the cost
8 overruns for which party, if you recall?

9 A My remembrance is we were working for the
10 owner.

11 Q The owner of the project?

12 A Correct. Sorry, my phone rang on my other
13 line. I apologize.

14 Q No, that's okay. All right. And it was a
15 dispute with whom? Was it the contractor or --

16 A Correct.

17 Q Okay. So were you attempting to value
18 the -- what these construction cost overruns would
19 cost? Was that your role?

20 A No, I wouldn't phrase it that way. I
21 mean, I'm not an engineer, so I'm not going to be
22 doing that.

23 Q Well, how would you phrase it? What were
24 you doing in that case?

25 A So I would be looking at the accumulation

1 of the costs related to the overall costs expended
2 by the general contractor, various different
3 approved or unapproved change orders, to look at the
4 potential cost overrun of the project.

5 **Q And what kinds of overruns were these, if**
6 **you recall?**

7 A I don't remember. I don't remember what
8 they specifically were in that case.

9 **Q Do you remember generally what they were,**
10 **any sense at all?**

11 A I mean, I could speculate, based on what
12 generally these type of cases have, but I don't
13 remember anything specific to this case.

14 **Q Do you remember anything at all about the**
15 **nature of the overruns?**

16 A Well, there was some, but I don't remember
17 specifically how much or what the reasons were, the
18 purposes were.

19 **Q And did you give -- you said you did not**
20 **give any testimony in that case; is that right?**

21 A That's my remembrance. I don't remember
22 giving any testimony.

23 **Q Did you draft a report in that case?**

24 A I don't even remember that for sure. I'm
25 sure we were in the process of it, but I just don't

1 remember when it settled.

2 **Q You do recall that it did settle, though,**
3 **correct?**

4 A I mean, obviously, it settled in some way.
5 I don't remember exactly how, but I don't believe I
6 ever was deposed. I don't believe I ever testified.

7 **Q Do you think you actually formed any**
8 **opinions in that case?**

9 A I mean, probably, but I don't remember
10 exactly how those would be memorialized.

11 **Q Did that case involve mineral interests in**
12 **any way?**

13 A I mean, I guess, yes, because there's
14 obviously something that has to be done when you
15 construct the site, but, again, I guess some people
16 would argue whether there's mineral interests or
17 not, but, it's -- you know, there's a subsurface
18 aspect to any type of wind farm. Let's just put it
19 that way.

20 **Q But were you opining on anything related**
21 **to mineral interests in that case?**

22 A I mean, no, not the way you phrased it.
23 Obviously, there would be costs related to that
24 particular activity, but I wouldn't be opining on
25 the actual mining itself.

1 Q And were you aware of any payments being
2 made to the mineral interest owner in that case? Do
3 you recall anything about that?

4 A I do not.

5 Q All right. Have you had any other
6 experience with litigation matters involving the
7 wind energy industry?

8 A I can't think of one.

9 Q Do you have any experience in the wind
10 industry in non- -- in a non-litigation context?

11 A It seems like there have been a couple of
12 cases that had wind farms on them, but nothing that
13 I can think of off the top of my head.

14 Q It wasn't anything you were looking at
15 specifically as to your engagement; is that fair?

16 A I mean, I would consider it was more of a
17 peripheral aspect. It wasn't the main aspect of the
18 case.

19 Q And it wasn't anything you were
20 specifically asked to form views on in those
21 matters; is that true?

22 A Yeah, that I don't remember. I don't
23 remember what the attorneys may have asked me to
24 look at in that way. I don't remember.

25 Q Do you recall in any of those matters

1 being asked to opine on payments that might be due
2 to mineral owners?

3 A No, I don't remember that aspect coming
4 up.

5 Q This is the first case in which you've
6 rendered that type of opinion; is that correct?

7 A No.

8 Q What other case have you rendered an
9 opinion about payments due to mineral owners in a
10 wind energy project?

11 A Okay. So if we're talking about specific
12 to wind projects, which was not your last question,
13 I can't think of one off the top of my head.

14 Q All right, sir. So we've looked at
15 Appendix A that listed the documents that you've
16 relied on after -- as of September 18th of 2020;
17 true?

18 A It's not on the screen anymore, but, yes,
19 that's what that document represents. There you go.
20 Thank you. Yes.

21 Q All right. Now, you said you've looked at
22 the three expert reports after that, correct?

23 A Yes.

24 Q All right. And you also said you believe
25 you've received some other information that you

1 Q I mean, you're aware that aggregate is
2 pretty generally available in many locations, true?

3 A That's fair.

4 MR. ASHWORTH: Hey, Ryan?

5 MR. RAY: Yes.

6 MR. ASHWORTH: Do you mind if we take a
7 quick break? I need to use the rest room. We've
8 been at it for about an hour now.

9 MR. RAY: No, let's take a few minutes.

10 THE WITNESS: Okay. Five minutes, is
11 that what we're saying?

12 MR. ASHWORTH: That works.

13 MR. RAY: Five, ten, something like that,
14 yeah.

15 THE WITNESS: Okay.

16 THE VIDEOGRAPHER: We're off the record at
17 11:02 a.m.

18 (A recess was had.)

19 THE VIDEOGRAPHER: We're back on the
20 record at 11:12 a.m.

21 Q (By Mr. Ashworth) All right, sir. Before
22 we left, we were talking about some of your work at
23 the -- I believe we were talking about Classick and
24 Music. What did you do in the CPA side, what was
25 your role there?

1 the criticisms.

2 Q Do you have any that generally come to
3 your mind, as we sit here right now?

4 A I would rather have the report in front of
5 me to give you all of them. I don't want to start
6 giving you a partial laundry list.

7 Q Can you think of one example as you sit
8 here right now, without even looking at the report
9 in front of you?

10 A Well, I think broadly he misses the point.
11 The point here in this particular situation is
12 negotiation of a lease. It doesn't have anything to
13 do in my mind about what that particular mineral may
14 be worth right there at that particular moment in
15 time. We're talking about damages related to this
16 case and what the mineral right owners should
17 receive as damages. That's what we're talking about
18 in this case. So he just totally misses the point.

19 Q Damages for what?

20 A For the failure to get a lease for the
21 mining activities that the Tenth Circuit determined
22 was going on.

23 MR. RAY: All right. Do we have up
24 Mr. Hazel's report, Exhibit 18? Is that the exhibit
25 that we have here?

1 full sentence from which that's quoted. It
2 starts -- do you see where it says, "These
3 regulations are intended to ensure that Indian
4 mineral owners desiring to have their resources
5 developed are assured that they will be developed in
6 a manner that," as they said, "maximizes their best
7 economic interests." Do you see that?

8 A Honestly, I can't see it because the
9 screen is cut off a little bit, but I think you read
10 it properly.

11 Q All right. Do you also have an
12 understanding that part 214 of these regulations
13 actually specifically applies in Osage County? You
14 looked at some of those, did you not?

15 A You'll have to refresh my memory, but that
16 sounds right.

17 (Exhibit 20 marked for identification.)

18 Q (By Mr. Ray) All right. Well, let's take
19 a look at Exhibit Number 20, and if we could, let's
20 go to page 32. And do you see there, sir, where
21 "Leases, among other things, must be on forms
22 prepared by the department, and the superintendent
23 of the Osage Indian School, Pawhuska, Oklahoma, will
24 furnish prospective lessees with such forms at the
25 cost of \$1 per set." Do you see that?

1 MR. ASHWORTH: Object to the form. Ryan,
2 I can't see where you're -- what you're referring
3 to. Could you enlarge it so I can see where you're
4 reading from?

5 MR. RAY: Yeah, it's from the first
6 sentence there.

7 A I mean, I think you read it properly, if
8 that's what you're asking, yes.

9 Q (By Mr. Ray) All right. And one of the
10 things there is a form N, which would be a lease,
11 except for lead and zinc, right?

12 A True.

13 Q Are you aware of any forms prepared by the
14 Department of the Interior that would have terms
15 like those you are proposing?

16 A I have no idea what you're talking about
17 there.

18 Q Have you seen a form lease that would have
19 payment terms like what you've proposed in your
20 report?

21 A Are you talking about our damage
22 calculation in our report?

23 Q Yes, sir, that's basically based on the
24 terms of the surface leases that the surface owners
25 got in this case, right?

1 A True.

2 Q Have you seen forms prepared by the
3 Department of the Interior that have terms like
4 that?

5 MR. ASHWORTH: Object to the form.

6 A I don't know why they would prepare those,
7 first of all, so I don't understand your question,
8 but I guess, no, I haven't seen something specific
9 like that.

10 (Exhibit 23 marked for identification.)

11 Q (By Mr. Ray) All right. Let's take a
12 look at Exhibit 23. Have you ever seen this
13 document, sir?

14 A This one does look familiar. I definitely
15 have some similar to this, but I can't remember if
16 it was Candy Creek or not.

17 Q All right. This would appear to be a
18 lease that was in effect in 2013 and 2014, true?

19 A A negotiated lease between the two parties
20 at that time period, yes.

21 Q Right. It's on a form prepared by the
22 Department of the Interior, is it not?

23 A That's what it appears.

24 Q All right. And it has -- in paragraph
25 2(a) it actually has a royalty rate, correct?

1 A It does.

2 Q And that's 51 cents per ton for all
3 limestone and Dolomite received; is it not?

4 A It technically says removed, but, yes.

5 Q Removed -- "removed from the premises" is
6 what it says, right?

7 A Yes.

8 Q That's what triggers payment of the
9 royalty under this document?

10 A We would have to look at the whole
11 document, but that's what this line says, yes.

12 Q All right. Well, please take a look, and
13 tell us if you -- I believe it's a two-page
14 document, sir. If you need to look at the entire
15 thing to tell us if you see any other payment terms
16 that are set out, please take a look and let us know
17 what they are. And I apologize. It's actually four
18 pages, maybe it's five.

19 A I'm not sure I really understand the
20 question. Are you trying to say what is the trigger
21 event for a payment --

22 Q Yes, sir.

23 A Is that what your question is?

24 Q I'm trying to ask you if there's anything
25 other than the removal of limestone or Dolomite?

1 A That would cause a payment?

2 Q Yes, sir.

3 A Okay. Can you go to the next page? Okay.
4 Keep going. Keep going. So I think your question
5 is, is the removal of the limestone and Dolomite the
6 triggering for the royalty? I agree with you.

7 Q Nothing else that triggers a payment in
8 this form prepared by the Department of Interior?

9 A I think that's fair.

10 Q All right. Let's go back to Exhibit 20,
11 and we'll take a look at page 12. Now, do you see
12 subsection (d), sir?

13 A You said B as in boy or D as in dog? Oh,
14 D? Okay.

15 Q D as in, yeah, Delta.

16 A Okay.

17 Q All right. Are you -- there was no gold,
18 silver, copper, lead, zinc, coal or asphaltum at
19 issue in this case, true?

20 A Correct.

21 Q All right. So this provision actually
22 requires a royalty rate for those substances for
23 "10 percent of the value at the nearest shipping
24 point of all ores, metals or minerals marketed,"
25 correct?

1 **required in subsection (d) for these materials?**

2 A You'll have to do that one again. Can you
3 say that one again?

4 Q **Is there anything else in this regulation**
5 **that would contemplate any different kind of royalty**
6 **for the substances at issue in this case, other than**
7 **that in subsection (d)?**

8 A Well, sure. I mean, again, the Indian
9 Nation didn't want the development at all, so we're
10 talking about leases that the Nation wants. Well,
11 they don't want this development, so if you're
12 trying to say that you have to charge us royalty in
13 every single possible situation, that doesn't make
14 sense to me.

15 Q **My question, sir, is specific to**
16 **subsection 210 of the Code of Federal Regulations,**
17 **and my question is whether anything in this**
18 **regulation contemplates a royalty for the substances**
19 **at issue here, other than that set forth in**
20 **subsection (d)?**

21 MR. ASHWORTH: Object to the form.

22 A Well, first of all, this is 214.10(d), not
23 what you said, but second of all, if there's a
24 negotiated lease for these, is this royalty
25 required, the answer is yes.

1 Q And are you highly qualified in all of
2 those areas?

3 A Yes.

4 Q All right. As it relates to wind, I
5 believe I understood you earlier that you've been
6 involved in one case involving wind energy that
7 involved construction overruns, correct?

8 A No, that's not what I said.

9 Q All right. What other wind energy
10 projects have you been involved in?

11 A Again, as we talked about previously,
12 there was the one case we talked about in detail. I
13 believe there was other cases where there was wind
14 farms as part of the development, but was not the
15 focal aspect of that particular case.

16 Q You certainly didn't analyze anything
17 about mineral leases in those cases specific to wind
18 farms, true?

19 A I don't remember that being a dynamic in
20 those cases, correct.

21 Q And you've never actually done that at all
22 before this case, true?

23 A Sure.

24 Q All right, sir. Let's take a look at the
25 third page of Exhibit Number 24. Is this a budget

1 **research; can you describe for us what kind of**
2 **industry research was done?**

3 A Trying to think of an example, just bear
4 with me a second here. I guess a good example would
5 be that we did some research related to the life
6 cycle of a wind turbine.

7 Q **Okay. Any other examples that you can**
8 **think of?**

9 A Off the top of my head, I think we did
10 some analysis related to wind projects related to
11 their cost structure. I think we did some research
12 related to the discount rates, to their rates of
13 return, to their revenue sources, to their
14 agreements with electrical providers, those types of
15 things.

16 Q **And did your research reveal any other**
17 **instance in which mineral owners were paid the same**
18 **as surface owners in a wind energy project?**

19 A I don't think the research spoke to that,
20 no.

21 Q **Are you aware of that occurring anywhere**
22 **else in the United States of America?**

23 A Again, that's not what we're doing here,
24 so I'm not sure why you're saying that, but I'm not
25 aware of that specific dynamic happening.

1 A Well, first of all, there's historical
2 amounts that would not have a present value, so it's
3 looking at the overall amounts that would be
4 received by the six surface owners.

5 **Q Over the entire life of the project?**

6 A Well, not technically over the entire life
7 of the project, over the initial period. It does
8 not include the renewal time frame.

9 **Q Your calculations do not include the**
10 **renewal time frame?**

11 A Correct.

12 **Q Because it wouldn't be appropriate to**
13 **include those, because we don't know if the renewal**
14 **is going to happen or not, right?**

15 A I would disagree with that. We were just
16 being conservative by just using the additional time
17 frame. Technically, you would add the probability
18 of the lease being extended, which is pretty likely,
19 but we're talking about out in the future, so it
20 would be present valued back.

21 **Q And how do you know it is likely that the**
22 **lease will be extended?**

23 A Based on any renewable project, they want
24 the project as long as possible. Now, obviously,
25 things can change in the industry at that time,

1 Q (By Mr. Ray) All right. Let's take a
2 look at Exhibit 26, if we could. Have you seen this
3 document before?

4 A It does look familiar. I don't remember
5 what context I saw this in, but it does look
6 familiar.

7 Q And did you understand that IEA Renewable
8 Energy was the contractor that constructed this
9 project?

10 A I actually thought it was a different name
11 that was spelled out, but I'm not trying to disagree
12 with you. They could be the same entity.

13 Q Well, whoever they are, it clearly appears
14 that they purchased some aggregate from Dewey,
15 Oklahoma, correct?

16 A That's what it appears, yes.

17 Q This was ordered on December 16th, 2014,
18 right?

19 A Yes.

20 Q That's during the construction period;
21 yes?

22 A Sounds right, yes.

23 Q All right. And it says, if we look in the
24 bottom sort of left hand there, it says, "Delivered
25 to Osage Wind project," right?

1 A It does.

2 Q So it certainly appears that aggregate
3 was, in fact, purchased for this project from
4 another source; yes?

5 A That's what it appears.

6 (Exhibit 27 marked for identification.)

7 Q (By Mr. Ray) Let's take a look at Exhibit
8 27, if we could. Have you seen this document
9 before, sir?

10 A This one does not look familiar, but,
11 again, it's a similar purchase order to the previous
12 one.

13 Q And it certainly indicates a number of
14 hard mineral type materials were purchased for the
15 Osage Wind farm; do you see that?

16 A Yeah. I mean, I guess we should be
17 careful about using the word, hard, in that
18 particular context, but there are various different
19 materials purchased here, yes.

20 Q Which one of them do you not define as
21 hard, if any?

22 A Well, I mean, again, I'm not trying to be,
23 you know, argumentative, but most people would
24 consider clay and fill, they wouldn't necessarily
25 consider that a hard mineral.

1 **we're on the right page.**

2 A Oh, yeah, you're on page 10 still, sorry.

3 "Based on the above descriptions," that's the one
4 you talked about?

5 Q **Yes, sir.**

6 A I see that.

7 Q **How is it the case, sir, that the mineral**
8 **estate is at least as integral as the surface estate**
9 **to the construction of the wind farm?**

10 A Yes.

11 Q **Explain how that is so.**

12 A Well, I mean, we've already talked about
13 that many times today, that their damages are
14 probably at least what the surface estate -- I
15 believe you even agreed with me a couple of times
16 that the mineral estate is typically more valuable.
17 The bottom line here is, if you can't anchor down
18 that wind turbine, it's worthless.

19 Q **So is that -- so is it the anchoring of it**
20 **in the subsurface that is the basis of your**
21 **conclusion there?**

22 A No. I'm just giving you an example of
23 something that has to have all the different aspects
24 of the equation. You can't just set it on top of
25 the surface.

1 **right, right? And you've seen that before, haven't**
2 **you?**

3 A I don't think I necessarily -- again, I
4 shouldn't be making legal conclusions like this or
5 interpretations. I don't read that that way, but if
6 a judge or another lawyer says that's the
7 interpretation of that language, that's fine. I'm
8 not interpreting it one way or the other.

9 Q **So it is your conclusion, sir, that the**
10 **mineral owners should receive a lease on these --**
11 **the terms, the same as Exhibit 28; is that correct?**

12 MR. ASHWORTH: Object to the form.

13 A I mean, no, that's not what my report
14 says. I mean, first of all, they may not want it at
15 all, so there should be no wind farm there. So
16 that's the first option. So, basically, now that
17 there is a wind farm there, do they have to tear it
18 up? Let somebody else decide that. But at this
19 point they have to have approval, being Osage Wind
20 has to have the approval of the mineral estate
21 owners, so why would they accept anything less than
22 what the surface owners got? It doesn't make any
23 sense. They would want at least that amount, if not
24 more, because, again, as you've agreed with me a
25 couple of different times, the mineral estate is

1 being damaged the whole time frame when the wind
2 farm is there. That's the damages component.

3 MR. RAY: Move to strike as nonresponsive.

4 Q (By Mr. Ray) My question again, sir, is,
5 do you have any evidence that mining occurred after
6 the construction period ended?

7 A Again, you've asked me that question
8 multiple times. I've told you that I don't have any
9 specific information, because I haven't looked into
10 that. I already told you a bunch of times it's not
11 relevant to me. That's not the calculation we made.

12 Q Are you aware, sir, of any other instance
13 in which a mineral owner is paid other than for the
14 production of minerals from the mineral estate?

15 MR. ASHWORTH: Object to the form.

16 A I mean, there are situations, especially
17 in the oil and gas, where people are paid for other
18 than the extraction itself, because they need other
19 types of either pipelines or houses or whatever they
20 need to basically do the overall production of that
21 mineral, which is not specific to the mineral
22 itself.

23 Q (By Mr. Ray) So in the oil and gas
24 context, there often are payments to hold it for
25 future production, right?

1 **Q The regulations you reviewed in this case,**
2 **that were at issue in the Tenth Circuit --**

3 A I guess I'm not following the question.
4 what do you mean?

5 **Q The regulations that were at issue in the**
6 **Tenth Circuit opinion; you understand that, right?**

7 A They mention certain particular statutes,
8 yes, but, again, they defined what they considered
9 mining in this particular context.

10 **Q And it was that activity that required a**
11 **lease, right?**

12 MR. ASHWORTH: Object to the form.

13 A They're required to get a lease to do
14 those activities. If they can't do those
15 activities, they can't have a wind farm. That's
16 what they're basically saying.

17 **Q (By Mr. Ray) And what do you base that**
18 **conclusion on, that they -- if they can't do those**
19 **activities they can't have a wind farm?**

20 A Well, because they constructed it that
21 way, so they must have felt it necessary to do it.

22 **Q Well, we've already seen, sir, in Exhibits**
23 **26 and 27 that these materials were available for**
24 **purchase from other locations, right?**

25 A Then they should have done that broadly.

1 that. That's not my place.

2 Q But they certainly would have been --
3 wouldn't have been extracting rock, sorting rock,
4 crushing rock, and reusing rock from this area,
5 true?

6 MR. ASHWORTH: Object to the form.

7 A Again, I don't know what they exactly
8 would have done, because that didn't occur.

9 Q (By Mr. Ray) But you know and understand
10 that aggregate is readily available for commercial
11 purpose -- purchase, do you not?

12 A You had to have asked that question at
13 least 10 times now, so we're not disagreeing on
14 that. They have access to it. They just didn't do
15 it that way.

16 MR. RAY: We've been going about an hour.
17 I'd like to take a rest room break, unless anyone
18 has an objection.

19 Is that okay with you, sir?

20 THE WITNESS: Sure. You're the boss.

21 THE VIDEOGRAPHER: We're off the record at
22 2:11 p.m.

23 (A recess was had.)

24 THE VIDEOGRAPHER: We're back on the
25 record at 2:27 p.m.

1 would be, of course, on the same terms, but if
2 you're asking whether they had been bifurcated or
3 separated, which is relatively unique, I can't think
4 of one specifically where they would have the exact
5 same terms.

6 **Q Is there any scholarly literature or**
7 **anything like that that you reviewed that indicated**
8 **that was an appropriate way of determining payments**
9 **to mineral owners when a wind farm is constructed?**

10 A I mean, it's just standard damage theory,
11 so I would think any treatise or document related to
12 damages would look at it that way.

13 **Q Specific to wind energy?**

14 A Specific to wind energy. No, they don't
15 get specifically, typically, to a specific industry.
16 I haven't seen any type of treatise that gets that
17 specific.

18 **Q And have you read any literature that**
19 **indicates that a mineral owner should be paid for**
20 **mining, other than based on the minerals mined?**

21 A Well, I mean, that's not the dynamic here.
22 Again, you have to get a lease to basically build
23 the wind farm. It's not a matter of paying for the
24 minerals. You're building a wind farm, so I don't
25 understand your question.

1 Q Well, we looked, sir, already at the Tenth
2 Circuit opinion that clearly said it was the
3 extraction, sorting, crushing, use of minerals that
4 required a lease, right? We looked at that?

5 MR. ASHWORTH: Object to the form.

6 A I agree.

7 Q (By Mr. Ray) And there was nothing in the
8 opinion that just said generally to construct a wind
9 farm, you have to have a lease, true?

10 MR. ASHWORTH: Object to the form.

11 A I don't understand that question. I mean,
12 we're talking about this specific case. They had
13 mining activities, so, therefore, they're required
14 to have a federally recognized lease, so, therefore,
15 they can't build it until they get the lease.

16 Q (By Mr. Ray) Right, but there's no mining
17 going on out there right now?

18 MR. ASHWORTH: Object to the form.

19 A Yeah, we've covered that ground at least
20 ten times, so I don't know why it matters. It
21 doesn't matter. They're still being damaged every
22 day the wind farm is there.

23 Q (By Mr. Ray) And how is that?

24 A How is what?

25 Q How are they being damaged every day that

1 conclusion, so I would not make that opinion.

2 Q (By Mr. Ray) So you're not rendering that
3 opinion in this case, true?

4 A If you're asking about the legal opinion,
5 absolutely not. I'm not a lawyer. That's not my
6 place.

7 Q Let's go back to your report, sir, page 7.
8 I believe that's Exhibit 18. And you reference, as
9 we've seen, sir, that "the surface leases represent
10 a directly comparable proxy for amounts that Osage
11 Wind itself was willing and able to pay." Do you
12 see that?

13 A Yes.

14 Q And what would they have been paying for?

15 A The right to obtain that lease.

16 Q And they needed the lease to do what?

17 A To construct -- ultimately, to construct
18 the wind farm because, again, the way they did it,
19 they would need to have that lease to basically do
20 the complete project.

21 Q Did any of the regulations you looked at,
22 sir, make reference to constructing a wind energy
23 project?

24 MR. ASHWORTH: Objection to form.

25 A I mean, I don't remember a specific one

1 suggest they were different from others that were
2 constructed on land?

3 A I mean, again, if you have a construction
4 on a hilly side versus a mountain versus a flat
5 land, of course, it's going to be different. The
6 construction aspects are going to be different. So
7 it is what it is. You do the construction based on
8 the specific topography of the land that you have.

9 Q And did you, sir, see any sources of
10 material or have any knowledge, other than your
11 opinion in this case, of surface owners and mineral
12 owners being paid the same amounts for a wind
13 project? Is there any other project you can
14 identify for us like that?

15 A Again, that's not my opinion in this case.
16 We're talking about it's similar to that, and we're
17 being conservative, but I have not seen that
18 specific dynamic, because, again, generally the
19 mineral estate gets more than the surface estate.

20 Q Are you aware of any wind energy project
21 where the mineral owner has received more than the
22 surface owner?

23 A I'm not aware of that, because, typically,
24 they're the same people.

25 Q Let me ask you this, sir, are you aware of

1 a coal mine where the surface owner gets paid more
2 than the mineral owner?

3 A I'm not aware of that. Is it possible
4 that occurs, it's possible.

5 Q And, sir, what is the basis for your
6 conclusion that the amounts paid to the surface
7 owners are a directly comparable proxy to what
8 should have been paid to the Osage Nation here?

9 MR. ASHWORTH: Object to the form.

10 A This negotiated deal between the various
11 parties is exactly the same land in question. One
12 is the subsurface, one is the surface, so they're
13 very close in proximity to each other. It's all the
14 dynamics to make it the best approximation of the
15 minimum amount that the mineral estate owner should
16 receive.

17 Q (By Mr. Ray) You understand that in most
18 cases the mineral owner and the surface owner are
19 paid differing amounts based on what's occurring,
20 are you not?

21 MR. ASHWORTH: Object to the form.

22 A Well, that question makes no sense, so, I
23 mean, do you want me to try to answer that?

24 Q (By Mr. Ray) Well, let me start with an
25 example, sir. So how about oil and gas, if we have

1 who has the rights to grab those or not, no.

2 Q Let's look, sir, at one specific category
3 of your report, and that will be on page 11 of your
4 report.

5 A Okay.

6 Q And that is pasture damages; do you see
7 that?

8 A I do.

9 Q And you state there that that is a payment
10 equal to \$28 per acre related to pasture/forage
11 grass actually destroyed or damaged; do you see
12 that?

13 A Yes.

14 Q All right. Now, did the mineral estate
15 owner have any rights in pasture or forage grass?

16 A No.

17 Q So how is it that they should receive a
18 payment that is for only forage grass actually -- or
19 pasture grass actually destroyed?

20 A Because we're looking at the overall
21 equation, first of all, and there would be similar
22 dynamics to the subsurface of things that were
23 affected. They would just use different semantics,
24 a different way of calling it, but it would have the
25 same type of category of damages.

1 Q Do you know the circumstance under
2 which -- do you know the circumstances under which
3 pasture or forage grass was actually destroyed in
4 this situation?

5 A Oh, I think there was some information
6 about that, but I don't remember the specifics.

7 Q So do you know for a fact that that
8 implicated any right of the mineral owner?

9 A Again, it's not -- I'm not trying to get
10 that precise. The situation here is we have a
11 proxy. So they would use different semantics, and
12 we fully agree with you, it's for -- basically,
13 that's more appropriate to subsurface, but they're
14 going to negotiate similar types of payments over
15 time for the dynamics that are specific to
16 subsurface.

17 Q And what would you use as the similar
18 subsurface comparable, if you will, to the pasture?

19 A I haven't thought about that. I don't
20 know. I would have to think about that.

21 Q Yet, you, in fact, have concluded that
22 those payments are due as a part of your analysis,
23 true?

24 A I've already explained to you why we did
25 that.

1 able to pay the surface owners?

2 Q Well, do you know whether that -- that
3 additional amount would make the project
4 economically viable or not? Do you know that, for
5 example?

6 A They would have to decide that and decide
7 if they want to produce the property at all and not
8 put a wind farm here at all, but they should have
9 determined that on the front end, not the back end.

10 Q But is there anything, sir, other than the
11 fact that payments like that were made to the
12 surface owners that you base that conclusion on?

13 A I think it's all the facts and
14 circumstances in this case. It's based on the
15 financial performance, it's based on all of the
16 documentation in the record, that they should get a
17 similar amount to the surface owners and actually
18 probably get more.

19 Q But you're not aware of any other wind
20 energy project in the United States where a separate
21 mineral owner has even been paid anything, are you?

22 MR. ASHWORTH: Object to the form.

23 A Again, this is a little bit different
24 dynamic in that case. So Osage Wind, it's their
25 requirement to understand all the things they have

1 clearly. I don't think it's clearly at all. It has
2 ten years in there, so it clearly says 10 years, but
3 it talks about absent specific lease provisions. In
4 the next sentence it talks absent specific lease
5 provisions to the contrary. I mean, it has all
6 sorts of different caveats just in that first
7 paragraph alone.

8 **Q (By Mr. Ray) Sir, does the absent**
9 **specific lease provisions to the contrary relate to**
10 **the term?**

11 MR. ASHWORTH: Object to the form.

12 A You tell me. You're the lawyer. I don't
13 know. I'm not making legal conclusions.

14 **Q (By Mr. Ray) You just don't -- you don't**
15 **know how long that a term of a lease can be**
16 **permitted to be under these regulations?**

17 MR. ASHWORTH: Object to the form.

18 A I honestly don't care, because I'm talking
19 about the damages, so you can interpret it any way
20 you want. It's not going to change my conclusion.

21 **Q (By Mr. Ray) I believe you said earlier,**
22 **sir, that you do not ascribe any damages to the**
23 **renewal term. Did I understand you correctly there?**

24 A We didn't specifically calculate the
25 renewal term, correct.

1 MR. RAY: All right. Let's go back to
2 Mr. Hazel's report, if we could, and if we could go
3 to page 19. That's Exhibit 18.

4 THE VIDEOGRAPHER: You did say Mr. Hazel's
5 report?

6 MR. RAY: I did. Exhibit 18, please.

7 THE VIDEOGRAPHER: One moment. I've got a
8 technical issue here. For some reason it is not
9 displaying. Could we go off the record for a
10 moment, please?

11 MR. RAY: Certainly.

12 THE VIDEOGRAPHER: We're off the record at
13 3:30 p.m.

14 (A recess was had)

15 THE VIDEOGRAPHER: We're back on the
16 record at 3:30 p.m.

17 Q (By Mr. Ray) All right, sir. This is on
18 page 19 of your report. It certainly appears to me
19 that you have calculated, about halfway through
20 table 7, future operating fees for the renewal term
21 period. Do you see that?

22 A Yeah, I stand corrected, you're right. We
23 did include the 20 years at the discounted amount,
24 you're right.

25 Q So should that be removed?

1 A No, I mean, it is what it is. It's based
2 on the time period of 2036 to 2056. We've already
3 risk adjusted, so it's still a fair calculation.

4 **Q And how is it risk adjusted? Explain that**
5 **to me, sir.**

6 A Okay. Sorry, because we didn't just use a
7 pure time value money, we used a risk adjusted rate.

8 **Q And what was the -- what was the risk**
9 **adjustment?**

10 A I don't know what you're asking there.

11 **Q You said you used a risk adjusted rate;**
12 **yes?**

13 A Yes.

14 **Q How did you determine the risk adjusted**
15 **rate?**

16 A The same way we considered the discount
17 rate in the other future operating fees, based on a
18 proxy of ocean, winds, cost of capital, plus an
19 add-on.

20 **Q And did you take into account if these**
21 **additional amounts were owed how that would affect**
22 **the calculation?**

23 A Sorry, you cut out on me again.

24 **Q I'm sorry. Did you take into account if**
25 **these additional amounts were owed how that would**

1 asked to look into. So, I mean, again, she says
2 what she says, and it is what it is. I don't agree
3 it's an inaccurate valuation. I don't agree it's an
4 inaccurate calculation of damages basis situation.
5 I don't agree that it's a disproportionate windfall.
6 How can it be a windfall? It's exactly the same
7 thing as the surface owners got. How could it be
8 possibly a windfall? That makes no sense
9 whatsoever. So all of those dynamics, I just
10 disagree, because I stand by my report.

11 **Q But you can't name for us, sir, any other**
12 **instance in which any other mineral owner has**
13 **received a penny for a mineral -- for a wind farm,**
14 **can you?**

15 A But again, in this case, they have to get
16 a lease, so that's irrelevant. They have to get a
17 lease. So they have to negotiate the lease with the
18 Osage Nation to basically get this wind farm in
19 place. My understanding, the Osage Nation would
20 have said no. Absolutely no is what they would have
21 said. So now you're in a dynamic where you have to
22 negotiate a lease with somebody that doesn't even
23 want to do what you want them to do. So again, it's
24 a very reasonable proxy to the damages in this
25 particular case.

1 **Q So why couldn't it be more?**

2 A I've already said it probably is more, but
3 I'm trying to get to the best, conservative proxy of
4 the damages for this particular case.

5 **Q But you're not aware of any other mineral**
6 **owner being paid in this way, correct?**

7 A Again, it doesn't matter. This particular
8 case is somewhat unique. They don't want a wind
9 farm there. I don't know how I can get that through
10 to you. They do not want a wind farm there. So now
11 you're negotiating with a party that doesn't want to
12 do what you're doing. How do you think that
13 negotiation is going to go?

14 **Q The question, sir, is not about relevance.**
15 **The question is whether you are aware of any other**
16 **mineral owner that has been paid in this way?**

17 A Again --

18 MR. ASHWORTH: Object to the form.

19 A -- I have not looked into that fully. It
20 doesn't matter to me. I'm looking at the facts and
21 circumstances of this case.

22 **Q (By Mr. Ray) Are you aware of anyone**
23 **other than you in a published article, a court case,**
24 **anywhere else that advocates for paying a mineral**
25 **owner for a wind energy project in the way you do?**

1 A Again, I don't think I published anywhere,
2 so I don't know what you're asking there. So do I
3 have a specific case with exactly these same facts
4 and circumstances, no. Are there similar cases that
5 speak to this, yes. So again, the judge or jury is
6 going to have to decide that.

7 **Q What similar case speaks to this, in your**
8 **opinion?**

9 A I didn't say there's a similar case. I
10 said there's other cases that speak to this. I'm
11 not a lawyer. I haven't investigated all the cases.

12 **Q Are you aware of even one?**

13 A There was a couple of cases that were
14 talked about, trying to remember the names. I think
15 one was Millsap that was part of the -- because I
16 don't know if it's specific to this dynamic we're
17 talking about. I think there's one called like
18 DeVilla is another case. There was various
19 different cases that the counsel had referenced and
20 kind of told me how the cases came out to basically
21 inform that opinion where it's a reasonable
22 calculation of the damages.

23 **Q Did Millsap versus Andrews involve a wind**
24 **energy project?**

25 A Again, I don't remember the specific of

1 the case, so I can't answer that.

2 **Q Did the DeVilla case involve a wind energy**
3 **project?**

4 A Again, I'm not sure how that's relevant,
5 but I don't remember one way or the other.

6 **Q It was a case you said informed your**
7 **conclusion in that regard; yes?**

8 A I didn't say that.

9 **Q All right. Did you rely on Millsap versus**
10 **Andrews in any manner?**

11 A I'm just answering your questions. I
12 don't think I would say I relied upon them, because,
13 again, I'm not a lawyer. You asked if there's other
14 similar cases that might have formed your opinion
15 about damage calculations. I gave you the best
16 answer I could. I don't remember the specific of
17 those cases.

18 **Q Can you tell us anything about the**
19 **specifics of those cases?**

20 A You could pull them up, and we could read
21 them together. I've read them before.

22 **Q No. My question is your recollection as**
23 **we sit here right now?**

24 A I've tried to give you my best remembrance
25 of what I read.

1 **Q Can you tell us anything at all about the**
2 **DeVilla case?**

3 A Again, you keep asking me the same
4 question over and over and over again. I've already
5 tried to answer that. I don't remember any
6 specifics about the case. I was trying to answer
7 your other question. I tried to give you examples.

8 **Q Did you say, sir, awhile ago that you have**
9 **not been published anywhere?**

10 A In this --

11 MR. ASHWORTH: Object to the form.

12 A -- particular case, I haven't been
13 published anywhere, because, of course, I haven't
14 testified in this matter.

15 **Q (By Mr. Ray) And can you identify any**
16 **source, other than you, that would say the mineral**
17 **owners and the surface owners should be paid in the**
18 **same way if mining occurs contrary to these**
19 **regulations?**

20 A Again, any damage treatise or textbook or
21 whatever would talk about the comparable analysis we
22 did. So all of those treatises and textbooks would
23 be similar to this dynamic.

24 **Q And they would say you would need some**
25 **kind of a comparable, correct?**

1 A Which we have here. We have a comparable
2 for the same property, for the same time period, for
3 the same project. All those different things are
4 the same.

5 **Q It's just a payment that's not based upon**
6 **mining production in any way?**

7 A Okay. I understand your position there,
8 but again, that's not what I calculated.

9 **Q And what are you calculating?**

10 A If you don't have that figured out by now,
11 we're going to be here a while. I've calculated the
12 damages to the mineral estate, based on the surface
13 owners as a proxy for the damages to the mineral
14 estate owner. I've already said it's kind of a
15 conservative. I've already said it probably should
16 be more, but I've tried to make a reasonable and
17 credible calculation based on the facts and
18 circumstances of this case.

19 **Q And by what methodology, sir, do you**
20 **conclude that that is an appropriate proxy in this**
21 **type of circumstance?**

22 A Based on all my years of training, based
23 on every single textbook and treatise I've looked
24 at, based on everything I've done in my whole
25 career.

1 **Q** But you can't point out a single one of
2 those that says that mineral owners and surface
3 owners are paid the same in wind energy development;
4 true?

5 A I don't believe any textbook would be that
6 specific to the industry. Plus the other dynamic;
7 it's not done that way. We're damage experts.
8 We're not -- there's not going to be a book that
9 says blank like that. It's not going to happen.

10 **Q** Is the only reason, sir, that you contend
11 that the surface leases are a better proxy than
12 actual mineral production in this county because you
13 believe the Osage Nation was opposed to the project?

14 A Is that the only reason?

15 **Q** Yes.

16 A Is that what you asked?

17 **Q** Yes, sir, that's what I'm asking.

18 A I don't think it's the only reason. I
19 think it's a big reason, but again, they went about
20 doing their construction regardless of what the
21 Osage Nation wanted or didn't want and, basically,
22 created it, so now they have to compensate them for
23 their damages.

24 **Q** Are there any other reasons that you
25 believe the surface payments are an appropriate